

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

IAN CARR,

Petitioner,

v.

**Civil action no. 3:05CV32
Criminal action no. 3:04CR50
(Judge Broadwater)**

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

On April 18, 2005, the *pro se* petitioner, Ian Carr, filed a Motion Under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody. This matter is pending before me for initial review and report and recommendation pursuant to April 22, 2005 Order of Referral issued by the Honorable W. Craig Broadwater, United States District Judge.

On October 13, 2004, the petitioner was convicted by a jury for the Northern District of West Virginia of being a felon in possession of a firearm. Subsequently, on February 22, 2005, the Court sentenced him to 120 months imprisonment.

On February 28, 2005, the petitioner filed a notice of appeal. Notwithstanding the fact that his appeal is pending, on April 18, 2005, the petitioner filed a §2255 motion in which he alleges as follows:

- (1) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and empaneled.

On or about October 14, 2003, I was allegedly charged with unlawful malicious wounding (2 counts). My case was presented to the Judge and probable cause was found and my case was bound over to the circuit court. Before I had a chance to plea or submit to a plea bargain by a state prosecutor my case was presented in front of a federal grand jury.

(2) Denial of effective assistance of counsel.

During prosecution of my case my lawyer kept telling me I was gonna lose that I won't win, to plea out, after telling him I wanted to go to trial. Also, he had me feeling I was in a no win situation the whole time so when I went to trial I felt like I was not getting represented accurately.

(3) Denial of right to appeal.

I have so much time to put appeal in and my lawyer contacts me not knowing what to do, as in what grounds etc. etc. to file an appeal on. He's the lawyer if he can't help me I can't help myself.

The petitioner's §2255 motion is premature because his appeal is pending before the Fourth Circuit Court of Appeals. See Walker v. Connor, 2003 WL 21660483 (4th Cir. 2003).¹ Thus, the undersigned recommends that the petitioner's 2255 motion be denied and dismissed without prejudice.

Any party may file within ten (10) days after the receipt of this Recommendation with the Clerk of the Court written objections identifying the portions of the Recommendation to which objections are made, and the basis for such objections. A copy of such objections should also be submitted to the Honorable W. Craig Broadwater, United States District Judge. Failure to timely file objections to the Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Recommendation.²

¹Pursuant to Fourth Circuit Local Rule 36(c), which disfavors citation of unpublished opinions, a copy of this unpublished opinion is attached.

² 28 U.S.C. § 636(b)(1); United States v. Schronce, 727 F.2d 91 (4th Cir.), cert. denied, 467 U.S. 1208 (1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).

The Clerk of Court is directed to mail a copy of this Recommendation to the *pro se* petitioner.

Dated: August 23, 2005

/s/ James E. Seibert
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE